

2. Media Access to the Institution:

Members of legitimate media, as defined in Title 15, CCR Section 3000 and DOM subsection 13010.5, will be allowed on San Quentin grounds on the day and time specified by the Warden. Requests must be made to the Assistant Director, Communications, in writing. A maximum of 125 non-witness news media personnel will be permitted to remain in the IST hall during and after the execution to await the Warden's post execution press conference. News media representatives who receive a letter of authorization from the Warden will be admitted to the institution, provided they are properly credentialed and attired.

3. Coordination of Non-witness News Media:

- a. All non-witness media members need to arrive at the institution's West Gate on the day and time specified by the Warden. Parking will be in the designated parking area. Media broadcast vans will be admitted to the institution grounds on a space-available basis and prior written approval of the Warden. Requests for such accommodations should be made when requesting to cover the event. All media members must have a photo I.D. and a letter signed by the Assistant Director of Communications.

The media members will be admitted and processed at the West Gate and escorted to the IST Building by the Administrative Assistant.

- b. After the execution, the media witnesses will join the non-witness media as soon as possible at the IST Building for the media press conference, where they will relate what they witnessed to the media non-witnesses. The Warden's press conference will follow at about one hour after an execution. At the conclusion of the Warden's press conference, all media personnel will be escorted to the West Gate, including broadcast vans.

4. Condition for Admittance of News Media Representatives:

- a. No "blue jeans" are allowed. "Blue jeans" are defined as any denim trousers colored any shade of blue, black, or gray.
- b. Cameras (still and video), recording equipment and other equipment will be allowed, subject to search.
- c. All media broadcast vans will be parked in the parking area adjacent to the IST building. Cameras and recording equipment will only be allowed in the IST Building and in the parking area.
- d. Satellite link-up vans may be allowed into the lower staff parking lot next to the visiting lot by prior arrangement.

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5. Interviews with Condemned Inmates:

All interviews will be consistent with departmental policy.

6. Information Releases:

- a. The names of the 12 official witness will not be released.
- b. The names of execution team members will not be released, nor will they be available for interviews or photographs.
- c. The Public Information Officer, at the direction of the Warden and Assistant Director, Communications, will be responsible for all news releases prior to, during and after an execution and for the developing of all necessary press and information releases.
- d. The Warden, with the assistance of the Assistant Director, Communications and Public Information Officer, will hold a press conference approximately one hour after a scheduled execution. No other interview will be given by the Warden after the news conference is completed.

E. EXECUTION CHAMBER OPERATION

1. Personnel:

a. Responsibilities:

- 1) WARDEN: The Warden shall have the overall responsibility for the execution and will work and train closely with all personnel responsible for all phases of the procedure. The Warden shall select the execution team.
- 2) CHIEF DEPUTY WARDEN: The Chief Deputy Warden shall be responsible for the security of the institution and will be in command of the Emergency Operations Center (EOC). The Chief Deputy Warden will be in command of SERT/NMT and other special security forces.
- 3) ASSOCIATE WARDEN, UNIT III: The Associate Warden, Unit III shall accompany the Warden on the day of the scheduled execution into the chamber anteroom.
- 4) CAPTAIN CENTRAL OPERATIONS: The Captain, Central Operations shall coordinate institutional operations. Responsible for sanitation of visiting areas, lounge areas, and entry road areas.

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- 5) PUBLIC INFORMATION OFFICER: Public Information Officer shall be responsible for all news releases prior to, during, and after an execution.
- 6) ADMINISTRATIVE ASSISTANT: Administrative Assistant is responsible for escorting the non-witness media members to the In-Service-Training building and providing security for the special media vans.
- 7) LIEUTENANT IN CHARGE OF THE EXECUTION CHAMBER: The Lieutenant in Charge of the execution chamber is responsible for the direct supervision of the execution team, as well as functioning as a liaison with the Warden. He/she is responsible for the necessary security integrity of the chamber areas and related functions. Responsible for the sanitation of chamber and adjacent areas.
- 8) RECORDER: A designated team member shall keep accurate records of time that each phase of the execution takes place.
- 9) THE DEATH WATCH CELL SERGEANT AND OFFICERS: The Death Watch Cell Sergeant and officers assigned to the overnight detail are responsible for the security of the condemned inmate(s) throughout the night until execution time, under the direction of the Lieutenant in Charge of the Chamber. If the condemned inmate is female, one of the officers shall be female.
- 10) WITNESS AREA OFFICERS: The witness area officers shall station themselves in the witness area during an execution
- 11) OTHER EXECUTION TEAM OFFICERS: The other execution team officers shall perform duties as assigned by the Lieutenant in Charge of the Chamber.

2. Facility: —

a. Description of Execution Chamber:

- 1) The lethal execution chamber for the State of California is a self-contained unit located at the California State Prison at San Quentin. The chamber area consists of the witness area, two (2) holding cells, the chemical room, kitchen/officers' area, anteroom and execution chamber.
- 2) The witness area is accessible directly by a door located between the main visiting room and the East Block visiting room. This area can be isolated from

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the rest of the chamber. Visibility during an execution is through five (5) windows. Capacity of this area is fifty (50) persons.

- 3) The two (2) holding cells each contain a toilet and sufficient room for a mattress.
- 4) The chemical room contains storage cabinets, work bench, and two (2) chemical mixing pots as well as pipe work and valves. This room is utilized during executions by lethal gas.
- 5) The kitchen/officers' area has a small sink, cabinet and counter area as well as a resting area for staff members.
- 6) The anteroom contains several valves and the chamber immersion lever, used during execution by lethal gas. Access to the witness area, or to North Block is through two (2) separate solid iron doors. Also in this area are direct telephone line utilized by the State Supreme Court and Attorney General's office.

3. Execution Chamber Maintenance:

A constant state of readiness and the proper safe operation of the execution chamber requires periodic inspection and maintenance of the chamber throughout the year.

The door to the execution chamber is to remain locked in the open position when not in use or testing.

To prevent corrosion, there is a natural draft to exhaust stack which keeps the chamber dry and free of any drain odor.

Total body fluid precautions will be instituted for infection control.

4. Lethal Injection Execution:

a. Chemicals needed for execution:

- 1) Sodium Pentothal, 5.0 Gm, plus one unopened backup.
- 2) Normal Saline, 20 cc.
- 3) Pancuronium Bromide (Pavulon), 50 mgm per 50 cc.

Five (5) 10 cc. ampules of 10 mgm each in each of three (3) syringes

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Total injection; 100 cc/100 mgm., or 2 syringes. One extra made up as stand-by.

- 4) Potassium Chloride, 50 mEq. per 50 cc.

Five (5) 10 cc. ampules of 10 mEq. in each of three (3) syringes

Total injection; 100 cc/100 mgm., or 2 syringes. One extra made up as stand-by.

b. Equipment and Materials:

- 1) One (1) Sodium Pentothal, 5 gm., w/diluent
- 2) Twenty (20) Pancuronium Bromide, 10 mgm. ampules (Pavulon)
- 3) Twenty (20) Potassium Chloride, 10 mEq. ampules
- 4) Ten (10) Syringes, 50 cc
- 5) Ten (10) Syringes, 20 cc
- 6) Ten (10) Needles 18 Ga., 1"
- 7) Five (5) Angiocaths, 20 Ga., 1"
- 8) Five (5) Angiocaths, 18 Ga., 1"
- 9) Five (5) Angiocaths, 16 Ga., 1 3/4"
- 10) Four (4) Normal Saline, IV bags, 1000 cc
- 11) Twelve (12) Extension sets, 72" long
- 12) One (1) Box alcohol preps
- 13) Four (4) Rolls adhesive tape, 1"
- 14) Four (4) Rolls adhesive tape, 2"
- 15) Four (4) Rolls adhesive tape, 3"
- 16) One (1) Pair scissors, Bandage, pr.
- 17) Six (6) Tourniquets
- 18) Box gloves, surgical, Size 7, sterile
- 19) Box gloves, surgical, Size 9, sterile
- 20) Box surgical masks

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- 21) Three (3) Flashlights, w/batteries
- 22) Ten (10) Chux
- 23) Two (2) Arm Boards
- 24) Six (6) 3 Way Stopcocks
- 25) Restraint Gear
Department approved handcuffs and leg irons.
- 26) Cardiac Monitor
Two (2) sets
- 27) Wall Clocks
Two (2)
- 28) Cleaning Supplies
As required for ongoing maintenance of chamber and onsite facilities.
- 29) Light Bulbs – assorted wattage
- 30) Hand soap
- 31) Paper Towels
- 32) Toilet Paper
- 33) Mop-up Towels
- 34) Visiting Room Buffer
Used on regular basis to wax floors, etc.

c. Inmate(s) Needs on Overnight Status:

- 1) Bed Mattress
- 2) Blanket
- 3) Pillow
- 4) Electric Heater and extension cord
- 5) AM/FM Radio
- 6) Television

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7) Inmate Clothing (3 sets)

State issue trousers
State issue undershorts
State issue undershirt
State issue socks
State issue blue shirt

In the event the condemned is a female, the clothing consists of brassiere, panties, and blue dress.

Female clothing will be provided by the Central California Women's Facility (and delivered with the condemned female 48 hours prior to actual execution date.)

8) Towels

9) Chess and Checkers set

10) Coffee and/or Approved Drinks (non-alcoholic)

11) Last Dinner Meal (as reasonable as possible)

ASCERTAIN DISPOSITION OF PERSONAL PROPERTY FROM CONDEMNED INMATE AFTER HIS/HER PLACEMENT IN OVERNIGHT CELL (DONATION, MAIL TO RELATIVE, ETC.)

d. Procedures:

1) Two (2) Weeks Prior to Scheduled Execution:

- (a) The Lieutenant in Charge of the Chamber will notify the Warden that the following procedures have been accomplished:

Specific staff assignments to the execution detail have been made.

Preliminary chamber area readiness and operational testing procedures have been made. Necessary maintenance work will be performed in the presence of the Lieutenant in Charge of the Chamber or his/her designate (Chamber Operator/Chemical Operator.)

Ensure the chamber areas have full complements of necessary household and personal needs of the condemned inmate and all required clothing is available.

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Ensure the direct telephone lines utilized by the State Supreme Court and the Attorney General's office are on-line and working.

Inventory all chemicals and equipment necessary in chamber operation are available and under proper storage.

2) One (1) Week Prior to Scheduled Execution:

- (a) The Lieutenant in Charge of the Chamber will inspect the chamber areas for the following:

Ensure all maintenance work requested has been completed and the chamber is ready.

Preliminary and operational tests are again performed to ensure readiness of chamber areas. The prison Correctional Plant Manager (CPM), and/or Maintenance Supervisor (Execution Team Liaison) will be present during this operational check of the chamber.

Ascertain all necessary clothing, personal items, overnight detail equipment, etc., are properly available and operational. The Lieutenant in Charge of the Chamber will notify the Warden of this inspection. At this point, all equipment should be operational and functioning properly.

All necessary supplies should be in the chamber area or where designated and ready for use.

The entire area should be in a high state of cleanliness and ready for outside witnesses.

3) Three (3) Days Prior to Scheduled Execution:

- (a) The following procedure will be strictly adhered to without exception:

The execution chamber area will be closed to any and all persons not specifically cleared by the Warden. The Lieutenant in Charge of the Chamber and necessary team members are authorized access.

All traffic into the chamber areas will be approved by the Lieutenant in Charge of the Chamber, who will directly supervise necessary traffic into the area.

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The Lieutenant in Charge of the Chamber will conduct the following pre-execution inventory and equipment check:

- (1) Members of the injection team shall conduct an equipment check of all materials necessary to perform the execution.
- (2) The inventory shall be conducted not less than twenty-four (24) hours, and not more than ninety-six (96) hours, before the scheduled execution.
- (3) Expiration and/or sterilization dates of all applicable items shall be checked on each individual item.
 - (a) Outdated items (e.g. Normal Saline bags) shall be replaced immediately.
 - (b) Sterilized packs bearing a sterilization date in excess of thirty (30) days shall be replaced or re-sterilized immediately.

At this time, the Lieutenant in Charge will be responsible for the security of the chamber. A search of all materials that will come into contact with the condemned inmate(s) will be made by the Execution Team. All equipment will be in working order and functioning properly.

All chemicals will be stored under appropriate controls to prevent tampering.

NOTE: In the event the condemned inmate is female, she will be transported from the Central California Women's Facility not earlier than three (3) days prior to the scheduled execution date. The condemned female will be placed upon arrival in the overnight cell and necessary coverage and supervision of the condemned inmate as outlined in this procedure for male inmates will be arranged by the Lieutenant in Charge of the Chamber.

4) One (1) Day Prior to Scheduled Execution:

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The Execution Team members as designated by the Lieutenant in Charge of the Chamber will perform the following:

(a) Obtaining Drugs:

- (1) During the afternoon immediately preceding an execution by lethal injection, a member of the injection team shall proceed to the pharmacy to obtain the necessary agents (drugs) for the procedure.
- (2) When the drugs have been issued, and quantities verified, they shall be placed in the Lethal Injection Drug Box, and the box locked.
- (3) A member of the injection team shall maintain personal, physical custody of the locked drug box until such time as it is opened for use, or for return if not used.

(b) Chamber Kitchen:

Check linen - includes officer cot and sheets, pillow, pillowcase and six (6) towels. Contact the laundry if additional supplies are needed.

Contact the Food Manager for foodstuffs; fruit, coffee, sugar, milk, and ice.

(c) Overnight Cells:

Thoroughly search cells, depending on number of executions set for the next day.

Obtain overnight cell furnishings. For each cell to be used, obtain one (1) mattress, one (1) blanket, and one (1) pillow from the storage closet located in the witness room.

Very thoroughly search each item. Place in overnight cell, spreading the blanket over the mattress. Place the pillow at the head of the mattress. LOCK THE CELL DOORS.

(d) At the appropriate time commensurate with the day and time of the execution:

- (1) Lieutenant in Charge of the chamber will contact the Warden for last minute information.

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(e) At the appropriate time commensurate with the day and time of the scheduled execution:

- (1) The appropriate number of supervisorial and custody staff as determined by the Associate Warden of Unit III will arrive at the condemned row office. One of the detail officers searches the clothing to be worn by the condemned inmate. The unit lieutenant makes the necessary notation in the condemned row log book. The escort team then enters the condemned tier and proceeds to the cell of the condemned inmate. While in the cell, the inmate is given an unclothed body search and then placed in mechanical restraints. The inmate, wearing his underclothing, is escorted to the holding cell where he is retained pending an unclothed body search which includes a metal detector scan.
- (2) Following this, he is given a complete new outfit of clothing that was previously searched by the officer. This clothing consists of undershirt, shorts, socks, blue jeans, blue shirt, and canvas slippers. All items of clothing are regulation for the institution. After the inmate is clothed, he is placed in restraint equipment. He is then escorted to the elevator via the condemned unit door, by the aforementioned officers, then to the lower floor of the cell block and to the door leading to the overnight cell area. A lieutenant, as per previous arrangements, is stationed on the opposite side of the door in the overnight cell area, with the necessary key which he passes to the officer through the door aperture. The door is unlocked and the officers escort the condemned inmate into one of the overnight cells, and the restraint equipment is removed.
- (3) One officer will be posted at the door leading to the overnight cell area after the condemned inmate is placed in the

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cell. This position will be posted during the third watch and first watch preceding the execution.

- (4) Equipment required for this position is one (1) handheld radio and key ring.
- (5) Commencing immediately upon posting, the officer will make a visual security check through the door aperture leading to the overnight cell and will continue the security checks every 30 minutes.
- (6) The Lieutenant in Charge of the chamber asks the inmate who his spiritual advisor is, then informs the condemned inmate of the time his dinner will be served.
- (7) The Lieutenant informs the inmate that he will return to see him later in the evening or sooner if the inmate desires. At this point, the inmate is introduced to the sergeant and two (2) officers who will be with him throughout the night. All staff, except the overnight detail, leave the chamber area, and the Lieutenant in Charge of the chamber reports directly to the Warden.

(f) At the appropriate time commensurate with the day and time of the scheduled execution:

- (1) Dinner is brought to the area by a sergeant and the supervising cook. The dinner normally is the meal requested by the inmate insofar as is reasonable and possible to obtain. Coffee is available throughout the night.

(g) At the appropriate time commensurate with the day and time of the scheduled execution:

- (1) The inmate is usually visited by the spiritual advisor of his choice and the Warden. The Lieutenant in Charge of the chamber returns during the evening to check with the overnight sergeant and officers and stays as

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required. He remains on duty through the execution. All visitors in the overnight cell area must be approved by the Warden.

- (2) The condemned inmate is allowed reasonable last requests. Normally, these requests include the following:
 - * Special items of food and soft drinks;
 - * Special programs on the radio or television set;
 - * Funds on the books be transferred as he might designate;
 - * He will be allowed to walk to the chamber without assistance;
 - * He will be allowed to send out last letters;
 - * The reporters and newspapers not mention his family, etc.
- (3) Requests, other than normally routine, are processed through the Warden or the Officer of the Day.
- (4) Routine requests are handled by the Lieutenant in Charge of the chamber or the respective Watch Commander on duty.
- (5) The Watch Commander will make routine checks with the overnight officers during their respective shifts.
- (6) The telephone located in the chamber kitchenette is restricted to the Warden, Lieutenant in Charge of the chamber, the Administrative Officer of the Day, and the Watch Commander on duty.

5) DAY OF SCHEDULED EXECUTION:

- (a) Approximately 3 hours prior to the execution:
 - (1) The state employee spiritual advisor may arrive at the overnight cell and, if requested to do so by the condemned

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inmate, remains until after the execution. On other occasions, he may give communion and then return 1 hour prior to the execution to remain until after the execution.

(b) Approximately 2 hours prior to the execution, the following procedure will be followed:

- (1) Members of the injection team shall enter the injection room and immediately reinventory the supplies and equipment to insure that all is in readiness, and if applicable, obtain replacement items from the pharmacy.

(c) Approximately 1 hour prior to execution, the following procedure will be followed:

The IV set-up will proceed as follows:

- (1) The connecting needle of Administration Set shall be inserted into outlet of the bag of Normal Saline IV solution.
- (2) The on-off clamp located between the "Y" injection site and the needle adapter shall be removed and discarded. The flow of solution shall be controlled by the Flo-Trol clamp located above the "Y" site.
 - (a) The lip of the neoprene diaphragm on the "Y" injection site shall be rolled back so that it can easily be removed for insertion of syringe tips instead of a needle.
 - (b) A 72-inch Extension Set shall be connected to the needle adapter of the Administration Set

NOTE: For the set-up for administration into the distal arm, a second Extension Set shall be required due to the additional distance.

- (3) An Angiocath (no smaller than 20 Ga. X 2") shall be connected to the needle adapter of the Extension Set. Optimal

injection flow may be achieved with a 14 Ga. or 16 Ga. Angiocath, if the veins will permit the use of the larger size.

- (4) The tubing shall be cleared of air and the Angiocath recovered. The set-up is ready for use.
- (5) Steps 1 through 6 shall be repeated for the second set-up.
- (6) The syringes containing the drugs shall be prepared and loaded in the following order:
 - (a) Two 35-cc syringes, each containing 20 cc of sterile Normal Saline. Label syringes "NS".
 - (b) Three 50-cc syringes, each containing 50 mEq of Potassium Chloride in 50 cc. Label syringes "3".
 - (c) Three 50-cc syringes, each containing 50 mgm of Pancuronium Bromide in 50 cc. Label syringes "2".
 - (d) One 35-cc syringe containing 5.0 Grams of Sodium Pentothal. (Kit contents to be dissolved in 20-25 cc of the accompanying diluent to attain complete, clear suspension.) The Sodium Pentothal, being a Federally controlled drug, shall be prepared last, when it appears that it shall actually be used. Label syringe "1".
- (7) A pre-medication is available if requested by the inmate. Valium, or its equivalent, a skeletal relaxant, will be administered if requested by the inmate and approved by the Health Care Manager.

It is noted that three syringes of Pavulon and three of Potassium Chloride are prepared, even though the injection procedure only calls

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for two of each. The extra syringes are to be prepared as "stand-bys", in the event one of the others is dropped in handling during the injection procedure. This will take place prior to moving the inmate into the execution chamber.

Chamber operator calls outside telephone operator for time check and sets the clock. Takes position on right side of chamber door. Opens chamber door upon Warden's signal to do so.

(d) Approximately 45 minutes prior to execution, the following procedure will be followed:

- (1) The Warden and two (2) physicians arrive at the execution chamber via the outside entrance. The Warden talks briefly with the condemned inmate.
- (2) The condemned inmate remains in the cell, accompanied by the spiritual advisor, until signaled by the Warden that the appointed time has arrived.

(e) Approximately 10 minutes prior to execution, the following procedure will be followed:

- (1) The Warden orders that the witnesses be brought into the witness area and take their designated places.
- (2) Escorting officers bring in the witnesses and then leave the area, to wait outside until after the execution when they will again escort the witnesses to their designated areas.

(f) When the appointed time for the execution has arrived and the signal to commence has been given by the Warden:

- (1) The inmate is moved into the execution chamber and secured onto the table. The heart monitor equipment is then connected to the monitor. The physician will verify the heart beat registers on the monitor.

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- (2) The following execution procedure is started:

The angiocath shall be inserted into a usable vein by a person qualified, trained, or otherwise authorized by law to initiate such a procedure. The flow of Normal Saline shall be started and administered at a slow rate of flow.

The above procedure shall be repeated on a secondary location on the inmate. This line shall be held in reserve as a contingency line in case of a malfunction or blockage in the first line.

NOTE: At this point, the administration sets shall be running at a slow rate of flow, and ready for the injection of syringes containing the injection agents. Observation of both set-ups to insure that the rate of flow is uninterrupted shall be maintained. **NO FURTHER ACTION** shall be taken until the pre-arranged signal to start the injection of lethal agents is given the Warden.

After the IV is started, injection team members vacate the chamber.

- (3) All officers vacate the chamber, the door is closed by the chamber operator and sealed by the Lieutenant.
- (4) The chamber operator then turns on the exhaust fan.
- (5) Total anonymity of the injection team members in the injection room shall be maintained. At **NO TIME** shall they be addressed by name, or asked anything that would require an oral response. The members of the injection team shall remove all jewelry and wear long sleeve shirts to cover any identifiable marks, tattoos, or scars.

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18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN JOSE DIVISION**

20 **DONALD J. BEARDSLEE,**

21 **Plaintiff,**

CAPITAL CASE

C 04-5381 JF

22 **v.**

23 **JEANNE WOODFORD, Director and JILL**
24 **BROWN, Warden,**

25 **Defendants.**

26 **DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING**
27 **ORDER AND PRELIMINARY INJUNCTION**

28 **Date: January 6, 2005**
Time: 1:30 p.m.
Courtroom: 3

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 DONALD J. BEARDSLEE,

14 Plaintiff,

15 v.

16 JEANNE WOODFORD, Director and JILL
17 BROWN, Warden,

18 Defendants.
19
20

CAPITAL CASE

C 04-5381 JF

DEFENDANTS' OPPOSITION
TO MOTION FOR
TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY
INJUNCTION

Date: January 6, 2005

Time: 1:30 p.m.

Courtroom: 3

21 Donald Beardslee is scheduled to be executed on January 19, 2005. He was sentenced to
22 death in 1984 by San Mateo County for crimes committed in 1981. To date every state and federal
23 court to consider his case has denied relief. On December 20, 2004, he filed the present action
24 pursuant to 42 U.S.C. § 1983 claiming that execution by lethal injection constitutes cruel and
25 unusual punishment in violation of the Eighth Amendment and will violate his free speech rights
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1 under the First Amendment.^{1/} He seeks injunctive relief to prevent the scheduled execution. If the
2 claims seem familiar, they are. With only two differences discussed below the complaint, most of
3 the exhibits, and the memorandum of points and authorities are identical to those filed earlier this
4 year by Kevin Cooper in an effort to stop his then-pending execution. In an order filed February 6,
5 2004, this Court denied the motion for a temporary restraining order and preliminary injunction.
6 *Cooper v. Rimmer*, No. C 04-436 JF. Exh. 1.^{2/} The Ninth Circuit affirmed that order. *Cooper v.*
7 *Rimmer*, 379 F.3d 1029 (9th Cir. 2004). With but one passing reference, Motion. at 3, Beardslee
8 fails to acknowledge, much less discuss, this Court's decision; he completely ignores the Ninth
9 Circuit opinion. The motion in this case is equally lacking in merit.

10 PROCEDURAL HISTORY

11 Beardslee was convicted in San Mateo County Superior Court for the first degree murders
12 of Patty Gedding and Stacy Benjamin, both of which were committed in April 1981. He was
13 sentenced to death for the Gedding murder and to life without parole for the Benjamin murder in
14 March 1984. The California Supreme Court affirmed the judgment in March 1991. *People v.*
15 *Beardslee*, 53 Cal.3d 68, 279 Cal.Rptr. 276 (1991). That court subsequently denied two state habeas
16 corpus petitions challenging the judgment.

17 In October 1992, Beardslee initiated federal habeas corpus proceedings in the United
18 States District Court for the Northern District of California. In a series of unpublished orders issued
19 in 1999, the district court dismissed or granted respondent's motion for summary judgment on the
20 majority of Beardslee's claims. It denied the remaining claims in April 2001 following an
21 evidentiary hearing. *Beardslee v. Woodford*, C 93-3990 SBA.

22 The Ninth Circuit affirmed the denial of relief and denied rehearing and rehearing en
23 banc. *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004). The Supreme Court denied certiorari,
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25 1. Although California authorizes both lethal gas and lethal injection as a method of
26 execution, Beardslee insists that he will not select between the two; thus, he will be executed by
27 lethal injection under the provisions of California Penal Code § 3604(b). Motion at 3.

28 2. Numbered exhibits accompany defendants' opposition; lettered exhibits were lodged by
Beardslee.

Defendants' Opposition To Motion For Temporary Restraining Order And Preliminary Injunction - C 04-5381 JF

1 *Beardslee v. Brown*, 125 S.Ct. 281 (2004), and rehearing. *Beardslee v. Brown*, ___ S.Ct. ___, 2004
2 WL 2692874 (2004).

3 Following denial of certiorari the San Mateo County Superior Court scheduled a hearing
4 to set an execution date. The attorney who had been representing Beardslee for several years in
5 federal court, and continues to represent him in this proceeding, complained that he had not been
6 appointed as state counsel. He also expressed concerns about payment and his lack of experience
7 in handling a clemency application. The California Supreme Court stayed the setting of an
8 execution date and appointed the Habeas Corpus Resource Center (HCRC) as counsel for any
9 further state post-conviction or clemency proceedings. The state court vacated the stay on
10 November 22, and the San Mateo District Attorney scheduled a new hearing for December 16, 2004.
11 After efforts to stay that hearing failed, the state court set Beardslee's execution for January 19,
12 2005. Beardslee filed the present complaint on December 20.

13 **ARGUMENT**

14 **I.**

15 **BEARDSLEE IS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE**
16 **HE PREVIOUSLY LITIGATED THIS CLAIM ON FEDERAL HABEAS**
17 **CORPUS**

18 Although styled as a civil rights action, Beardslee's challenge to the method of execution
19 is more properly cognizable in federal court as a habeas corpus claim. Indeed, Beardslee recognized
20 as much by challenging the use of lethal gas and lethal injection in his amended petition for writ of
21 habeas corpus. If properly characterized as a habeas corpus petition the complaint must be
22 dismissed because the Ninth Circuit has not authorized the filing of a successive petition as required
23 by 28 U.S.C. § 2254(b). We recognize, however, that the appropriate method for challenging an
24 execution method is not entirely clear. The Ninth Circuit has held that "a challenge to a method of
25 execution may be brought as a § 1983 action." *Fierro v. Gomez*, 77 F.3d 301, 305-306 (9th Cir.
26 1996). Although that issue was before the Supreme Court last term, the Court did not determine
27 which vehicle is preferred. *Nelson v. Campbell*, 124 S.Ct. 2117, 2123 (2004). In *Cooper*, decided
28 before the Supreme Court issued its opinion in *Nelson*, this Court held that § 1983 was an
appropriate procedure for challenging the method of execution. Exh. 1 at 2.

1 Beardslee seeks an equitable remedy, and "[e]quity must take into account the State's
2 strong interest in proceeding with its judgment and [any] obvious attempt at manipulation." *Gomez*
3 *v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 653-654 (1992) (per curiam).
4 Citing *Gomez*, the Supreme Court emphasized in *Nelson* that before granting a stay of execution the
5 court must consider "not only the likelihood of success on the merits and the relative harms to the
6 parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim."
7 There is a "strong equitable presumption against the grant of a stay where a claim could have been
8 brought at such a time as to allow consideration of the merits without requiring entry of a stay." 124
9 S.Ct. at 2126.

10 Beardslee first challenged California's prescribed method of execution in his second state
11 habeas corpus petition, filed in 1996. His specific allegations focused exclusively on the use of
12 lethal gas. Beardslee's entire reference to lethal injection alleged: "Subjecting Petitioner to death
13 by lethal injection also constitutes cruel and unusual punishment violative of his Eighth and
14 Fourteenth Amendment rights." He then added a footnote acknowledging the absence of a "valid
15 legal basis" for the lethal injection claim. Exh. 2. Beardslee offered no factual allegations,
16 declarations, or other exhibits to support his challenge. Relief was denied on the merits by the state
17 supreme court.

18 Beardslee repeated his claim that the use of lethal gas is unconstitutional in the 1996
19 amended federal habeas corpus petition. He offered the same one-line allegation with respect to
20 lethal injection, the same concession that his claim lacked any legal basis, and again failed to present
21 any factual or documentary support for his assertion. Exh.3. Beardslee did not seek an evidentiary
22 hearing on the claim and the district court granted summary judgment for respondent. Exh. 4. He
23 did not seek a certificate of appealability to raise the claim on appeal to the Ninth Circuit.
24 Throughout these proceedings Beardslee was represented, in whole or in part, by the attorney who
25 filed this action.

26 It is clear Beardslee already had an opportunity to fully litigate his claim in the habeas
27 corpus proceedings but failed to do so. He made no effort to provide evidentiary support for the
28 allegations of his petition and there is no showing that the combination of drugs now used was

1 different in 1996 or that criticism of the state procedures he now asserts could not have been
2 developed at that time. By not seeking an evidentiary hearing or a COA he effectively abandoned
3 the claim. There is no doubt that if presented in an application for permission to file a second or
4 successive petition this claim would be dismissed pursuant to 28 U.S.C. § 2244(b)(1). *See, e.g.,*
5 *Nevius v. McDaniel*, 218 F.3d 940, 944 (9th Cir. 2000) (claims raised in first habeas petition must
6 be dismissed); *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) (same).

7 Assuming, in light of the Ninth Circuit's decision in *Fierro* and the Supreme Court's
8 failure to resolve the issue in *Nelson*, that § 1983 is generally available as a means of challenging
9 a method of execution, Beardslee, having earlier pursued the claim (however haplessly) on habeas,
10 is not entitled to relitigate the claim under § 1983. Nothing in *Fierro*, *Nelson*, or any other case
11 suggests otherwise. Not only would allowing Beardslee's ploy flaunt limitations on successive
12 litigation imposed by Congress in the AEDPA, it would be inconsistent with the equitable concerns
13 that inform the judiciary's treatment of last-minute filings to halt imminent state executions. Indeed,
14 Beardslee's action reinforces the importance of restricting litigation of this sort when initiated after
15 the setting of an execution date. Beardslee was obviously aware of the issue when he was litigating
16 his habeas corpus petition and, based on the pleadings in this action, is certainly familiar with efforts
17 by other death row inmates to challenge the use of lethal injection. Beardslee's own conduct to date
18 forecloses his effort to secure injunctive relief. Accordingly, his motion should be denied.

19 II.

20 BEARDSLEE FAILS TO SATISFY THE REQUIREMENTS FOR 21 INJUNCTIVE RELIEF

22 In order to obtain an injunction staying his execution Beardslee must show either (1) a
23 likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of
24 serious questions going to the merits and the balance of hardships tipping in his favor. *Roe v.*
25 *Anderson*, 134 F.3d 1400, 1401-1402 (9th Cir. 1998). Wholly apart from his delay Beardslee's
26 claim affirmatively lacks merit.

27 As noted above Beardslee seeks the same relief on essentially the same grounds rejected
28 by this Court in the Cooper litigation. Except for the addition of a First Amendment claim, the

1 significance of which is discussed below, his complaint is indistinguishable from the one filed by
2 Cooper. Compare Exh. 5, Cooper's complaint, with Beardslee's complaint. Again, with only one
3 difference, his motion for a temporary injunction is identical. Compare Exh. 6, Cooper's motion,
4 with Beardslee's motion.

5 On review of Cooper's complaints, this Court determined that Cooper did not meet his
6 burden of demonstrating either the likelihood of success on the merits or the existence of serious
7 questions going to the merits. Exh. 1 at 4. The Court noted the widespread acceptance of lethal
8 injection as a valid method of execution and the decisions of other courts which had specifically
9 rejected challenges similar to Cooper's. Exh. 1 at 4-6.^{3/} Indeed, to date no inmate has succeeded
10 in demonstrating any unconstitutional infirmity or shortcoming of lethal injection as a method of
11 execution. See, e.g., *Sizer v. Oken*, 124 S.Ct. 2868 (2004) (vacating stay of execution entered by
12 district court based on challenge to lethal injection protocols; Oken was executed June 17, 2004);
13 *Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (denying stay of execution based on challenge to
14 lethal injection protocol; Aldrich was executed October 12, 2004); *Harris v. Johnson*, 376 F.3d 414
15 (5th Cir. 2004) (denying stay of execution based on challenge to lethal injection procedure; Harris
16 was executed June 30, 2004); *Reid v. Johnson*, 333 F.Supp.2d 543 (E.D. Va 2004) (denying
17 injunction based on challenge to lethal injection procedures and combination of drugs); *Reid v.*
18 *Johnson*, 125 S.Ct. 25 (2004) (denying injunction; Reid was executed September 9, 2004).

19 Following this Court's order Cooper sought a stay from the Ninth Circuit. It too denied
20 relief. Noting that it had "previously upheld the constitutionality of lethal injection as a method of
21 execution," the circuit court observed that at least two states had rejected such claims under
22 procedures similar to California but with "lesser dosages of anesthesia." *Cooper v. Rimmer*, 379
23 F.3d 1029, 103 (9th Cir. 2004). While acknowledging "there can be no guarantee error will not
24 occur," the court held that Cooper fell "short of showing that he is subject to an unnecessary risk of
25 constitutional pain or suffering such that his execution by lethal injection under California's protocol
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27
28 3. The declarations of experts upon which defendants relied in Cooper were lodged by
Beardslee with his complaint. Exhs. R, S.

1 must be restrained.” *Id.* at 1033. Beardslee makes no showing that the protocol to be used in his
2 execution has changed since the Cooper litigation. Indeed, his extensive duplication of Cooper’s
3 complaint and motion effectively concedes they are the same. Accordingly, this Court’s earlier order
4 and its affirmance by the Ninth Circuit establish that Beardslee’s motion is without merit.
5 Beardslee’s presentation must suffer the same fate, for there are no material differences between his
6 submissions and Cooper’s.

7 **A. Alleged Violation Of First Amendment Rights**

8 Cooper alleged that his execution under the present protocols for lethal injection would
9 violate the First, Eighth, and Fourteenth Amendments by denying him access to the courts. He
10 further alleged it would violate the right of the public to view the execution because they could not
11 determine whether he was suffering pain. Exh. 5 at 8. Beardslee additionally contends that he has
12 a First Amendment right to communicate information about failures in the execution protocols. He
13 alleges that injection of pancuronium bromide will paralyze his voluntary muscles and thus violate
14 his free speech rights. Complaint at 8-9. This allegation adds nothing to his showing.

15 If Beardslee is executed by lethal injection one of two scenarios will result:

- 16 1. He will remain conscious and experience tortuous pain, or
17 2. He will be unconscious from the combination of drugs and unable to experience
18 anything.

19 If the second scenario occurs then Beardslee will suffer no violation of any federal
20 constitutional right. If the first occurs Beardslee wants to be able to report the experience. The
21 problem for Beardslee, however, is that scenario 1 assumes that he is correct about the likelihood
22 of the injection protocols resulting in the conscious experience of tortuous pain. It is precisely the
23 inadequacy of that showing which led this Court and the Ninth Circuit to deny injunctive relief in
24 *Cooper*. Except as discussed below, Beardslee’s showing with respect to the likelihood he will
25 suffer pain is indistinguishable from the *Cooper* case. Alleging a desire to report on the effects of
26 his execution does not improve to any extent the sufficiency of the showing that there will actually
27 be anything to report. Beardslee’s First Amendment complaint is make weight at best and provides
28 no basis for enjoining the execution.

1 **B. Reliance Upon Autopsy Reports From Executions In Other States**

2 Cooper argued in reliance on the declaration of Dr. Mark Heath that the first drug, sodium
3 pentothal, which is used to induce unconsciousness, could wear off, thus resulting in the prisoner
4 experiencing extreme pain when the third drug, potassium chloride is injected. He claimed the
5 second drug, pancuronium bromide, would paralyze him but not prevent him from experiencing the
6 pain. Defendants submitted a declaration from Dr. Mark Dershwitz who demonstrated that all but
7 an infinitesimally small number of people would be rendered unconscious within sixty seconds after
8 administration of the dosage of sodium pentothal (or thiopental sodium as it is also called).
9 "[V]irtually every person given five grams of thiopental sodium will have stopped breathing prior"
10 to injection of the second, paralytic, drug. *Cooper v. Rimmer*, 379 F.3d at 1032. In conjunction with
11 his declaration Dr. Dershwitz prepared charts demonstrating the likelihood of consciousness based
12 on the blood concentration of sodium pentothal. The doctor concluded that the amount given in
13 California "would render most people unconscious for a period in excess of 13 hours," substantially
14 longer than any lethal injection in any state has lasted. Exh. R at R-4, ¶ 13.

15 Beardslee also relies on Dr. Heath, Exh. A, whose declaration is identical to the one
16 submitted by Cooper with one exception. Since the Cooper litigation Dr. Heath has reviewed
17 toxicology reports completed after executions in other states. Conceding that no autopsy or
18 toxicology reports exist for any California execution, Exh. A at 7, ¶ 17, Dr. Heath nonetheless asserts
19 that the sodium pentothal levels reported after death raised "grave" or "serious" concern the inmates
20 were conscious during the executions. Exh. A at 7-8, ¶¶ 18-19. In his motion Beardslee goes so far
21 as to place the information from the other state executions on a copy of the chart prepared by Dr.
22 Dershwitz in Cooper and concludes: "What [these results] suggest is that prison officials are not
23 properly trained to administer anesthesia in prisoners, and that they will likely suffer an
24 excruciatingly painful death as a result." Motion at 19. They show no such thing. Although Cooper
25 did not include the information from other states in his complaint, this is not the first time a death
26 row inmate has made use of that information.

27 In *Reid v. Johnson*, 333 F.Supp.2d at 546-548, the district court concluded in reliance on
28 a declaration from Dr. Dershwitz that the two grams of sodium thiopental used in Virginia would

1 assure the inmate's unconsciousness. Reid sought to overcome that conclusion through reliance on
2 Dr. Heath's consideration of "post-mortem blood toxicology reports of condemned inmates from
3 other states," which, according to the doctor, raised a "possibility that the inmate may have been
4 conscious during his execution." We set forth in full the district court's rejection of that argument:

5 The lack of pertinent information regarding when and how the blood was gathered renders
6 these reports of little value as a basis for rendering an opinion based on reasonable
7 medical certainty as to the amount of sodium thiopental that had actually reached the
8 inmate's system. Any probative value of the toxicology reports was further diminished
9 by the lack of information regarding the specific chemicals used to execute the inmate
described in the report and the unexplained presence of other sedatives. In short, the
sodium thiopental level found in the toxicology report for a particular inmate is not
indicative of the consciousness of that inmate during his execution, much less probative
of whether a condemned Virginia inmate will be conscious throughout his execution.

10 333 F.Supp.2d at 548.

11 The defects *Reid* are just as obvious in Beardslee's complaint. Beardslee makes no effort
12 to demonstrate how much of the drug was actually administered in each of the executions, how long
13 the execution lasted, or how long after death the autopsy or toxicology studies were done. Dr.
14 Heath's continuing concerns, which seem to evolve from case-to-case and state-to-state, do not
15 establish a showing of irreparable injury sufficient to warrant a stay of execution. The district court
16 in Virginia found "the chance that Reid will be conscious of any pain associated with the second two
17 drugs of his death is less than 6/1000 of one percent." 333 F.Supp.2d at 551. That percentage is
18 even lower here inasmuch as Beardslee will be given more than twice the amount of sodium
19 thiopental used in Virginia. The "likelihood of [Beardslee] suffering irreparable harm from the
20 manner in which the defendants intend to carry out his sentence is so remote as to be nonexistent."
21 *Id.* Because Beardslee adds nothing to the showing made by Cooper, he provides no reason for this
22 Court to grant him the injunctive relief rejected by the Court and the Ninth Circuit in *Cooper*.

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CONCLUSION

For the reasons stated above defendants respectfully submit that the motion for temporary restraining order and preliminary injunction be denied.

Dated: December 23, 2004

Respectfully submitted,

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